TWO LETTERS ON *DEMOCRACY AND DYSFUNCTION*

Sanford Levinson & Jack M. Balkin***

December 17, 2019

Dear Jack,

I've been remiss in beginning our exchange about the wonderful symposium at Drake University in September, not only because of ordinary busyness but also, of course, because of "events on the ground" that are so central to the various issues raised in our book and then at the symposium. Inasmuch as the central issue is whether our institutions, let alone some "center," can hold against the various winds and arrows buffeting them, every day seems to bring new examples of ever-increasing pressure. Only in this past week, for example, Great Britain gave Prime Minister Boris Johnson an overwhelming majority in Parliament, even though his party received only a grand total of around 44 percent of the total vote.[1] On its face, this raises obvious questions about the merits of the voting system,[2] including the reliance on single-member districts and first-past-the-post winners that the United Kingdom and the United States are really quite exceptional among countries across the globe in relying on. At the same time, the House Judiciary Committee voted to impeach President Donald Trump, and the whole House will certainly accept the recommendation, triggering a trial in the Senate where Majority Leader Mitch McConnell has already declared his role to be a faithful agent of the White House in defending the President.[3] There is not even a pretense of being faithful to the oath that every senator will take to act impartially and be guided by the evidence. They are instead acting like a version of the Red Queen in Wonderland; though

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Because our book, *Democracy and Dysfunction*, is written in the form of letters addressed to each other, we have decided to write our responses to the articles in this symposium in the same format.

This exchange was written in December 2019, before President Trump's impeachment trial and the coronavirus pandemic. Readers should consider how subsequent events affect the arguments made here.

1. *Election Results 2019: Boris Johnson Returns to Power with Big Majority*, BBC (Dec. 13, 2019), www.bbc.com/news/election-2019-50765773 [https://perma.cc/6K5K-5GLU].

2. Amanda Taub, *The U.K. Election Explained, in One Number*, N.Y. TIMES (Dec. 16, 2019), https://www.nytimes.com/2019/12/16/world/europe/uk-election-brexit.html.

3. Sheryl Gay Stolberg, *McConnell, Coordinating with White House, Lays Plans for Impeachment Trial*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/13/us/politics/mcconnell-white-house-impeachment-trial.html.

instead of sentence first, evidence afterward, in this case it will be to announce acquittal first coupled with total disdain for the evidence (or for calling witnesses who might supply important evidence). It is understandable that the President is not supportive of his impeachment; what is more ominous, though, is his clear attempt to stir up animosity among his base at the "traitors" and "scum" who are not willing to kowtow to his leadership.

How, indeed, does one assess arguments that we wrote less than two years ago that nonetheless appear at times from another age? Miguel Schor takes note, for example, in his remarks of the "pessimism" that currently pervades the academy about the survival of democratic constitutionalism.[4] He suggests, rather optimistically, we might be saved if we can amend parts of our Constitution, as I strongly advocate, and "find common ground once again."[5] I wonder if his relative optimism from September continues in what is now the Iowa winter of December, especially when serious people are willing to bet even money that President Trump will be reelected, as the joint product of Democratic ineptitude in choosing a candidate plus the operation of the Electoral College that might well produce a Trump victory even as he loses the popular vote by a margin far greater than the nearly 3 million votes in 2016.

David Pozen is also relatively optimistic, inasmuch as he takes issue with my sharp distinction between what I have called the "Constitution of Settlement" and the "Constitution of Conversation," the first of which is meant to refer to what I have also labeled as the "hard-wired," structural portions of the Constitution that are never litigated and serve as an "iron cage" within which we conduct our politics. He suggests many of them are in fact more malleable than I suggest, even if, to be sure, they are rarely litigated in the same way that the Constitution of Conversation is.[6] He presents a variety of interesting examples, including ways to work around the Electoral College through mechanisms such as the FairVote proposal by which the states with a total of 270 electoral votes would band together to pledge to throw their votes to whoever wins the national popular vote.[7]

I have my doubts about the success of this project. One reason is that it defines *winner* only in terms of coming in first, not achieving a majority of the vote. As suggested in my opening sentences, I am not a fan of first-past-the-post voting systems. FairVote does nothing to alleviate the reality of our presidential

4. Miguel Schor, *Constitutional Democracy and Scholarly Fashions*, 68 DRAKE L. REV. 359, 360 (2020).

5. *Id.* at 369.

6. David E. Pozen, *The Shrinking Constitution of Settlement*, 68 DRAKE L. REV. 335, 336, 338 (2020).

7. *Id.* at 338–39.

election system that, for example, gave us Richard Nixon in 1968 and then Bill Clinton in 1992. Each received only 43 percent of the popular vote because of the presence of third-party candidates who got nontrivial percentages of the vote (including, in 1968, some electoral votes, though not enough to deprive Nixon of his electoral-vote majority).[8] But there is also the genuine constitutional problem as to whether any compact among the states that would, in essence, abolish the present Electoral College, inasmuch as it allows election of candidates such as George W. Bush and Donald Trump who came in second in the national popular vote,[9] would require the approval of Congress. One could certainly read the text of the Constitution as requiring this approval, and one could be as certainly doubtful that Republican senators especially would acquiesce. The final certainty is that litigation would ensue. We might have another opportunity to see whether the Supreme Court would decide an issue of this magnitude with a 5–4 vote that could easily be viewed as reflecting the almost-literally unprecedented partisan divisions among the present justices.

Or perhaps David would see what appears to be the patent unwillingness of Senator McConnell to tolerate a serious trial in the Senate as a way of modifying the Impeachment Clause and rendering it even more useless as a mechanism of presidential accountability. More and more, I think, the Impeachment Clause operates as a genuine bug and not at all a feature of the Constitution.

Frank Buckley, in his own interesting presentation at Drake, made a powerful case that Canada is far preferable to the United States inasmuch as it wisely rejected presidentialism in favor of parliamentarianism.[10] I increasingly agree with him, just as I am stimulated by the arguments that he makes in his forthcoming book, basically advocating for the breakup of the United States via internal, secessionist movements. But of course, it is difficult to treat his arguments, however stimulating, as anything other than academic thought experiments, given the high unlikelihood that they will even become the subjects of serious discussion, let alone adopted. As someone who has been criticizing the Constitution now for at least two decades and advocating, increasingly stridently, for the necessity of genuine changes through amendment (and a constitutional convention), I am all too aware that there appears to be no public audience for these arguments. Indeed, a major reason for adopting the format of *Democracy and Dysfunction* is that the two of us, in spite of our decades-long collaborations as

8. Taub, *supra* note 2; Editors of Encyclopedia Britannica, *United States Presidential Election Results*, BRITANNICA, https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863 [https://perma.cc/YQ96-EM8A].

9. *See* Pozen, *supra* note 6, at 337.

10. F.H. Buckley, *The Fall and Rise of Crown Government*, 68 DRAKE L. REV. 247, 255–56 (2020).

coauthors of many pieces together, fundamentally disagree on the necessity for formal constitutional amendment.

Given recent events and the more general tenor of the national mood, I find Leah Litman's article to be especially interesting, inasmuch as she is attacking a fundamental premise of the U.S. legal system, i.e., lawyers should themselves not be viewed as evil or even subject to criticism because they in fact find themselves on occasion defending evil clients.[11] As someone who (by choice) taught courses on professional responsibility and legal ethics for many years, I was more than willing to defend the commendable proposition that everyone is entitled to what the American Bar Association calls a "zealous" defense, especially against the powers of the state. But she offers some serious caveats to that position, particularly when we attend to the actual realities of who or what is being defended. She focuses especially on the quite modern creation of a specialized network of elite lawyers that tends to be almost an oligopoly in terms of ability to gain access before the United States Supreme Court as an advocate in high-profile cases.[12]

Today, it might well be regarded as near malpractice to do what I did in 1978–81, that is, take a case from the Princeton, New Jersey traffic court to the United States Supreme Court, with a stop at the Supreme Court of New Jersey along the way. That was, importantly, my first (and last) real appearance in a courtroom. Even though I won the case, one might question,

especially today, whether I should instead have sought out someone whose real profession was appellate argument in front of the Supreme Court.

This is the age of celebrity lawyers, not as in the past, which was typified by lawyers such as Clarence Darrow or, more recently, Alan Dershowitz, but rather by persons such as Paul Clement, Walter Dellinger, Ted Olson, and others, an increasing number of whom are former or acting Solicitor Generals and who appear before the Court multiple times in any given term. By any conventional measure, they are superb lawyers (and in the case of Dellinger, a good friend whom I greatly admire). But, Litman suggests this has led to undue toleration of the actual causes to which some of them have devoted their talents.[13] Thus, she suggests the "familiarity and insularity" of this elite bar has led to an undue tolerance of the actual positions that the lawyers take.[14] This coziness has generated "professional and personal pressures to stick by other members of the elite network of lawyers, including lawyers who have facilitated the destruction of important constitutional

11. Leah Litman, *Lawyer's Democratic Dysfunction*, 68 DRAKE L. REV. 303, 321–22 (2020).

12. *Id.* at 307.

13. *Id.*

14. *Id.*

norms and thereby undermined a healthy, democratic constitutional order."[15] Of course, even if these lawyers have facilitated the destruction that she bewails, primary responsibility should be placed on the judges themselves that choose to write or join opinions such as *Shelby County v. Holder*,[16] *Trump v. Hawaii*,[17] or the series of arbitration decisions that have, as a practical matter, made it nearly impossible for ordinary people to gain legal redress against abusive corporations.[18] Still, that doesn't negate the power of her argument.

I suspect you and I have no hesitation in denouncing some variety of these decisions to our students. But the real question, Litman suggests, is whether we extend our denunciations to the actual authors of these decisions or even to the lawyers who presented arguments that may have been adopted by the Court.[19] Dahlia Lithwick, a legal-affairs reporter for Slate, created quite a stir when she published an article indicating she could no longer enter the United States Supreme Court because it was now so tainted by the presence of Brett Kavanaugh among its members.[20] She is raising a truly serious question: At what point, if at all, do we allow our distaste for individual decisionmakers (and the decisions they enable) to lead us to challenge fundamentally the legitimacy of the institution itself and, at least indirectly, to criticize those who avert their eyes from the present institutional realities, whether at the Court, across the street in Congress, or down Pennsylvania Avenue at the White House?

Litman's challenge, or possibly Lithwick's, cannot be limited to how we respond to a coterie of elite lawyers who frankly do not rely on academic approval. It would be far more serious to adopt her call for levying "professional costs for the people who help the government do [bad] things."[21] She offers the specific example of these people "losing out on the opportunity for future government appointments."[22] But again, "we" as academics have almost no say in who gets or retains these appointments. Where we *do* have some degree of power is determining who thrives within the legal academy itself. To what degree, if at all,

15. *Id.*

16. Shelby County v. Holder, 570 U.S. 529 (2013).

17. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

18. *See, e.g.*, Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system. html.

19. Litman, *supra* note 11, at 307.

20. Dahlia Lithwick, *Why I Haven't Gone Back to SCOTUS Since Kavanaugh*, SLATE (Oct. 30, 2019), https://slate.com/news-and-politics/2019/10/year-after-kavanaugh-cant-go-back-to-scotus.html [https://perma.cc/EDB4-CT39].

21. Litman, *supra* note 11, at 322.

22. *Id.*

should potential entrants or candidates for lateral appointments from other institutions be assessed not only on the basis of presumptively apolitical legal and academic skills but instead at least partly on the basis of how they used those skills with regard to certain great issues of the day? Should those of us who believe that global warming presents an existential crisis be averse to hiring someone who defended coal companies resisting environmental regulation?

The academy, like the polity more generally, depends on certain norms of tolerance, sometimes labeled *forbearance*, with regard to even the most divisive of political issues. But, not surprisingly, these norms are subject to attack when one is truly faced with what one regards as evil and not merely "mistaken" or "regrettable" views. Preston Brooks is presumably subject to criticism for caning Charles Sumner, but what about skilled lawyers who defended slavery or, following 1865, did what they could to minimize reconstruction and ensure the return of southern governance to a white-supremacist ruling class? Is it enough to reject the violence of caning or should one go on to condemn more polite lawyers who nonetheless devoted their professional skills to defending white supremacy?

Litman offers the specific example of those lawyers, one of whom is now a judge on the Ninth Circuit Court of Appeals while another enjoys tenure at a leading U.S. law school, who defended the use of torture by the Bush Administration.[23] For what it is worth, they did carefully distinguish forbidden "torture" from mere "enhanced interrogation," including means that had long been viewed as torture, such as waterboarding. I do not have answers that I am entirely comfortable with to these questions. The inevitable end of the road of these questions brings us to Carl Schmitt, the brilliant German jurisprudent who defended the Nazi takeover of Prussia in Germany (and won his case before the German court).[24] Schmitt, unlike many former Nazis, was denied "rehabilitation" after World War II and therefore never returned to the classroom. Perhaps we simply retreat to "Nazi exceptionalism" to explain that, but Litman's powerful and disturbing article suggests we have some explaining to do about aspects of the U.S. legal system and the role played by elite lawyers (and academics) within it.[25]

23. *Id.* at 310–11.

24. *Carl Schmitt*, STAN. ENCYCLOPEDIA PHIL. (Aug. 29, 2019), https://plato.stanford.edu/entries/schmitt/ [https://perma.cc/5F8J-LLQW].

25. As noted earlier, this letter was written long ago, even before the farce of the impeachment "trial" before the U.S. Senate, which included the participation of, among others, Professor Alan Dershowitz who made an argument that appeared, on the surface, to offer President Trump almost complete immunity from congressional accountability. The issues raised by the discussants at the Drake symposium in September 2019 have certainly not been rendered any less important by subsequent events.

Sandy

December 27, 2019

Dear Sandy,

In my response to this wonderful symposium, I want to discuss a few of the very interesting ideas in Miguel Schor's, Mark Kende's, and Franita Tolson's contributions.

Like you, Franita Tolson questions the boundary line that separates constitutional crisis from constitutional rot. As you recall, in the book, I define *constitutional rot* as:

> a decay in the features of our system that maintain it as a healthy democracy and a healthy republic.
>
> . . . .
>
> By "democratic," I mean responsive to popular will and popular opinion. By "republican," I mean that representatives are devoted to the public good and responsive to the interests of the public as a whole—as opposed to a small group of powerful individuals and groups. When representatives are responsive not to the interests of the public in general but to a relatively small group of individuals and groups, we have oligarchy.[26]

In our book, I distinguished between constitutional crisis, which is a moment

26. SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 105–06 (2019).

of impending constitutional failure, and constitutional rot, which is a protracted period of decay in our representative institutions.[27] But even if crisis and rot are distinct in theory, they may not be so in practice. Constitutional rot can fade into crisis or slowly transform into crisis. And this transformation may be gradual and protracted, lacking a clear break.

We have defined *constitutional crisis* as the moment when a constitution is about to fail or when people reasonably believe that it is about to fail.[28] We have generally assumed that the point of constitutions is to make politics possible—to direct struggles for political power into legal and constitutional forms. Constitutions fail when they fail at this central task. That might mean, for example, that government officials openly defy a constitution (Type One); that a constitution leads to paralysis and inaction that results in disaster (Type Two); or that the constitutional system can no longer keep political conflict within the bounds of peaceful political competition, resulting in secession, civil war, or violence in the streets (Type Three).[29]

But the notion of constitutional rot sliding slowly into constitutional crisis suggests a different kind of constitutional failure. A constitution gradually fails at being what it purports to be—a democracy and a republic. There may be no secession movements, no political paralysis, no riots in the streets, and politicians may not openly defy the constitution. But something important has happened nevertheless. The country is no longer really a democracy, or it is no longer really a republic. Instead, even if regular elections continue, the country has nevertheless gradually changed into an oligarchy, a plutocracy, or a kleptocracy.

The transition might be slow and subtle at first; it might gain speed later on. Eventually, it becomes obvious to those not blinded by propaganda that democracy has been defeated. The country retains its formal constitution, but it is no longer a democratic republic.

Such a constitutional crisis can sneak up on the public bit by bit, as the public increasingly accepts features that are inconsistent with the principles of republican government. People engage in one rationalization after another for what is happening around them, or they simply put it out of their minds and tend to their respective gardens. Many people do not realize that their constitution has failed until it is too late. Then, one day, they wake up and suddenly recognize they have lost something very precious.

If you think that the United States is on the verge of (or in the middle of) a

27. *Id.* at 105.
28. *Id.* at 92–93.
29. *Id.* at 92.

constitutional crisis brought on by constitutional rot, that is how you might explain it. The constitutional crisis is that the country is on the verge of losing its democratic and republican character. This crisis is quite different from situations in which government officials overtly reject the Constitution or defy direct judicial orders. In fact, if the courts are captured and rendered sufficiently docile, politicians never have to disobey direct judicial orders because judges won't stand up to them.

Whether constitutional rot has actually given way to constitutional crisis in the United States could consume another essay—indeed, another book. Certainly, many critics of President Trump fear that this is so. I am more doubtful, for reasons I describe in our book; but at some point, even I would agree that the line has been crossed. Tolson thinks that we have already crossed the line because she argues that the judiciary is being stocked with judges who are complacent about oligarchy and who will not protect democracy.[30] Your essays in *Democracy and Dysfunction* suggest that you think we are close to the line, if we have not already traversed it.

Tolson's second point concerns the baseline from which we judge constitutional rot. My treatment of constitutional rot as cyclic presumes that there are long periods when the Constitution is not suffering from very much constitutional rot and other periods when rot is a serious problem.

Yet I have also defined constitutional rot as the process by which the Constitution becomes undemocratic and unrepublican. If that is the criterion, the U.S. Constitution may have been rotten from the start. As Tolson puts it: "I . . . do not assume we have ever had a healthy democracy or republic . . . . I believe our status quo is constitutional rot . . . ."[31] For much of U.S. history, many of its people were enslaved, and free women who were citizens could not participate in politics. Even after the Nineteenth Amendment, black women in the South (like black men) were shut out of the franchise by Jim Crow laws. And even after that, "[w]ith the rise of the carceral state, African American and Hispanic men have lost their right to vote in huge numbers, a pattern that obviously continues to this day."[32] Since the 1980s, the United States "has been moving toward an oligarchy in which there is little or no interest in the public good."[33] And our elected "representatives must continuously raise money and cannot adopt policies for the good of the public without fear of angering their rich overlords."[34] Thus, Tolson argues, "[T]he real

30. Franita Tolson, *Levinson and Balkin Are Both Right?: Article V, the Supreme Court, and the Cost of Political Dysfunction*, 68 DRAKE L. REV. 237, 238 (2020).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

question is whether we have crossed the line from our usual posture of constitutional rot into a constitutional crisis. The loss of the judiciary, to me, is the clearest example that we have crossed this line."[35]

This is an important corrective. To make sense of the idea of constitutional rot, one needs a baseline for comparison. That baseline cannot be a period that is fully democratic and fully republican, for we have never had such a constitutional system.

Deciding on the appropriate baseline may involve complicated judgments about our history. For example, I have argued that the 1850s were a period of constitutional rot. The United States had democratized during the antebellum period through the creation of mass political parties, the extension of suffrage, and the removal of property qualifications. By the 1850s, however, Free Soilers and antislavery Republicans argued that American democracy had been hijacked by an oligarchical system they called the "Slave Power."[36] A small group of wealthy plantation owners made rich by slavery had leveraged their disproportionate economic power to control both state and federal governments. They eventually packed the Supreme Court with their supporters, including the Chief Justice, Roger B. Taney.

Critics of the Slave Power argued that the institution of slavery—and the unquenchable desire of slaveowners to extend their economic and political power—had warped the constitutional system, undermining the process of democratization and making government increasingly less responsive to and representative of the interests of the broad mass of voters—that is, white men.[37] But even if this critique of the Slave Power were correct, it ignored the fact that, for women and African Americans, the constitutional system remained thoroughly unrepresentative and oppressive—to say nothing of the treatment of Native Americans. The early Jacksonian era may have been a period of increasing democracy for some, but not for everybody—indeed, not even for a majority of the people living and toiling in the United States.

Similarly, I would argue that the Gilded Age is also a time of increasing constitutional rot. That judgment, too, requires a baseline of comparison—most likely Reconstruction's aspiration to rework the U.S. constitutional system and generate a "new birth of freedom" that would extend to an ever-greater share of the population. Yet Reconstruction was hardly free of unrepublican and

35. *Id.*

36. HEATHER COX RICHARDSON, TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY 6–9 (2014) (describing the impetus for the founding of the Republican Party).

37. *Id.*

undemocratic elements—for one thing, women still were not able to vote. And if the Progressive Era marked the beginning of a decline in constitutional rot—because of its many structural and good-government reforms—it was also a period of social unrest and racial antagonism.

In short, one cannot really speak of a period in our constitutional history that is free from constitutional rot, at least if we judge the past from our current vantage point. The undemocratic and unrepublican elements of our constitutional system are never eliminated. Things just get a bit better over time, until the backsliding begins anew.

That is one reason why I have rejected what I call the "Great Progressive Narrative," which describes the history of the United States as a democracy that, every day, in every way, is getting better and better, more democratic, more egalitarian, more just, and more free.[38] Instead of a narrative of progress, I have argued for the idea of constitutional redemption. This idea has three entailments. The first is that our Constitution exists, and always has existed, in a fallen condition, perpetually backsliding and perpetually in danger of doing so.[39] The second is that, nevertheless, the Constitution contains promises to the future that remain unfulfilled.[40] The third is that it is the duty of each generation to do its part to make those promises true in their own time, recognizing that, in the words of the Talmud, they do not have to finish the great work, but neither are they free to refrain from it.[41]

What is the relationship between constitutional rot and constitutional redemption? Our constitutional system is always imperfect and flawed, and it always contains the possibility of further constitutional decay within its institutions and its political culture. To this extent, the idea of constitutional redemption accepts one version of the traditional view of republics, an idea that goes back to the Greek historian Polybius: The possibility of decay is endemic; it can never be fully eliminated but only held at bay.

However, the idea of constitutional redemption adds a new element to the classic republican account. A democratic constitution is not merely a delicate equilibrium that must be maintained. Rather, it contains unfulfilled promises to become more and better than it currently is, promises that may not be true in the

38. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 3 (2011).

39. *Id.* at 6, 16, 27–28, 121, 143.

40. *Id.* at 18–20.

41. *Id.* at 5.

present but must be realized in history. The idea of redemption assumes an obligation more robust and self-critical than the mere duty to hold off decay. It assumes that the people living under a constitution should acknowledge that their system is flawed and imperfect and attempt to make the constitutional system more democratic and more republican over time. Stasis is not the goal; redemption is. And what redemption ultimately looks like may be quite different from what people in the past might have dreamed of or imagined.

That is why the work of redemption cannot be the work of a single generation—for that generation may be limited by its own moral imagination and moral compromises. And that is why the practice of redemption cannot simply be constitutional restoration—for that would only restore us to a previous fallen state. To redeem the Constitution after the Civil War, it was not enough to end slavery and restore universal manhood suffrage. The problems of democracy had changed, and the demands of reform required more than a simple restoration to a slaveholder's republic without slavery. In like fashion, to redeem the Constitution following the Gilded Age, it was not enough to return to the Constitution of 1868. The world—economy, society, and technology—had changed in the interim, and the problem was how to secure republican government under these changed conditions. So too, to redeem the Constitution following our current slide into oligarchy, it will not be enough to return to the civil rights revolution or to the mid-twentieth-century blossoming of civil liberties. The world has changed so much since then. Renewing a democratic republic in our Second Gilded Age, an age of plutocracy and surveillance capitalism, may require changes that we can at present only dimly imagine.

That we live in a world of digital capitalism provides a segue to the other major topic of this reply. You may have noticed, Sandy, that two of the essays in the symposium, by Mark Kende and Miguel Schor, focus on the state of digital communications media and how digital media are undermining American democracy. Although I discussed President Trump's use of media briefly, I think it is fair to say that neither of us made media policy a central theme of the book.

Although I agree that the Internet has created important challenges for American democracy, much of the harm to our civic culture has come through predigital media—talk radio and cable news.[42] Both Schor and Kende, however, think that digital media are a central cause of democratic dysfunction. Schor points out that the Internet and social media have led to polarization, digital propaganda,

42. YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 7–8, 14–16, 311–13 (2018) (emphasizing the role of talk radio and cable news in generating the media ecology's current pathologies).

and disinformation campaigns, which have plagued democracies around the world and may well have contributed to the general trend of democratic retrogression today.[43] Kende argues forcefully that social media have hastened democratic dysfunction.[44] In their current unregulated form, he asserts, social media pose a serious threat to American democracy, and he offers a lengthy bill of particulars.[45]

I have written a great deal about the challenge of digital media and how governments should and should not regulate it.[46] I won't repeat that analysis here. Instead, I want to connect Kende's and Schor's articles to the central debate in our book; namely, how much we should focus on the hard-wired Constitution or on other institutions as the central causes of democratic dysfunction.

I would restate Kende and Schor's concerns in the following way: A well-functioning public sphere is necessary to a well-functioning democracy. Democracies cannot function if there is no shared sense of facts and no joint commitment to truth. That is because it becomes impossible to persuade people that your policy proposals actually make the world better rather than simply being special pleading or propaganda that benefits you or your group. Belief in a shared reality is also central to the republican idea that the whole point of government is to promote the public good. If the members of society do not share a common reality, it is very hard to have a public good to pursue.

In addition, democracies cannot function properly when people become so polarized that they do not trust their fellow citizens, members of other groups, members of other political parties, or the central public and private institutions of political and social life. When people do not trust social institutions, conspiracy theories thrive. In environments with low information and low trust, politicians are freer to engage in corruption. The link between public opinion and government power that legitimates democracy breaks down.

Schor and Kende argue that freedom of speech is now undermining

43. *See* Schor, *supra* note 4, at 364.

44. *See* Mark S. Kende, *Social Media, The First Amendment, and Democratic Dysfunction in the Trump Era*, 68 DRAKE L. REV. 273, 278, 293 (2020).

45. *Id.* at 274–77.

46. *See, e.g.*, Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011 (2018) [hereinafter Balkin, *Free Speech Is a Triangle*]; Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, KNIGHT FIRST AMEND. INST. (Mar. 25, 2020), https://knightcolumbia.org/content/how-to-regulate-and-not-regulate-social-media [https://perma.cc/AML3-LXQ8]; Jack M. Balkin, *Fixing Social Media's Grand Bargain* (Hoover Working Grp. On Nat'l Sec., Tech. & Law, Aegis Series Paper No. 1814, 2018), https://www.hoover.org/sites/default/files/research/docs/balkin_webreadypdf.pdf [https://perma.cc/8C82-3X78].

democracy instead of supporting it as it did in the twentieth century.[47] But I think that this is a misdiagnosis. A democratic political culture has never depended solely on the liberty to speak. A well-functioning public sphere requires more than the circulation of opinions. It also requires institutions for the creation and dissemination of knowledge. These institutions include educational institutions such as public schools, colleges, and universities; scientific and research institutions; journalistic institutions that gather news and report it; and libraries, archives, and museums that store and preserve knowledge, art, and culture. These institutions are all around us, and they provide the connective tissue of the public sphere. These institutions are necessary for politics to operate on the basis of shared factual beliefs. They are also necessary to inform and develop public opinion. Without them, democracy is blind—nothing but opinions chasing more opinions. With them, democracy has a chance to survive.

Institutions for the production and dissemination of knowledge, which are so crucial to democracy, must be guided by professional and public-regarding norms and not exist solely for profit. They must be both trustworthy *and* trusted by the general public. Only then can they perform their appropriate function in a democracy. Robert Post has called this the requirement of "democratic competence."[48] He rightly identifies it with Alexander Meiklejohn's theory of freedom of speech, which argues that the point of freedom of expression is to achieve a well-informed public that can govern itself.[49]

The basic problem of the early twenty-first century is that the Second Gilded Age produced a new media system that democratized and globalized communication. This new media system created a new kind of digital public sphere that swallowed up the old public sphere defined by print and broadcast media. However, this new digital public sphere lacks the new forms of trusted and trustworthy knowledge-producing institutions that are necessary to safeguard democracy under changed conditions. We do not yet have sufficiently trustworthy digital institutions governed by public-regarding professional norms. Worse yet, the large and powerful digital companies that do exist have undermined older, trusted institutions and professions that are crucial to a well-functioning public sphere.

Right now, the major social media companies are really surveillance companies. They collect and collate data to predict and modify end-user behavior in order to sell targeted advertising. Digital companies have harmful effects on

47. Kende, *supra* note 44, at 273–74; Schor, *supra* note 4, at 360–62.

48. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 33–35 (2012).

49. *Id.* at 35–36.

democracy and society because their business models encourage it. To the extent that these companies are governed by professional norms, they are not public-regarding, democracy-promoting norms. Instead, they are norms directed at increasing the level of skill at surveillance, prediction, control, and modification of end-user behavior.

The goal of media regulation in the twenty-first century is twofold. First, media policy should seek to change business models—to give social media companies incentives to be responsible and trustworthy institutions. Second, media policy should try to shore up existing institutions—and help encourage the creation of new ones—that will produce and disseminate knowledge and information in order to foster democratic competence.

Two other features of digital media complicate the regulatory problem. The first is that digital media companies have grown so powerful that they now act as an auxiliary form of governance. We have moved from a dyadic model of states governing speakers to a triangular or pluralist model in which both states and digital companies govern speakers, and states attempt to coerce or coopt digital companies into doing much of their regulatory work for them.[50]

A second complication is that governance of the digital public sphere is increasingly shared with other countries (or supra-individual entities such as the European Union). European data protection regulation and Chinese regulation of telecommunications technology affect speech worldwide, including in the United States. Russian propaganda seeks to sow havoc in countries around the world. In the digital age, digital media policy is interdependent: Each country not only shapes media policy within its own borders but also affects media policy in other countries as well.

Reforms must proceed on multiple fronts, including antitrust and competition law, new privacy and consumer protection laws, telecommunications reforms, and investments in cybersecurity and telecommunications infrastructures. Note, however, that these potential reforms have very little to do with the hard-wired Constitution, and they do not require constitutional amendment or a new constitutional convention. And if Schor and Kende are correct that a major cause of democratic dysfunction is a dysfunctional digital public sphere,[51] it does not appear to have been caused by a poor constitutional design in 1787.

Moreover, if Schor is correct that digital media have created problems for democracy around the world,[52] then it follows that they have created problems for

50. Balkin, *Free Speech Is a Triangle*, *supra* note 46, at 2014–15, 2019.
51. *See* Kende, *supra* note 44, at 277–78; Schor, *supra* note 4, at 360–61.
52. *See* Schor, *supra* note 4, at 363–64.

countries whose constitutions are different from the U.S. Constitution. If digital media have created a dysfunctional public sphere, the reasons do not seem to have much to do with the choice between presidential and parliamentary systems, the presence or absence of a presidential veto, and so on.

To be sure, if a well-functioning public sphere is necessary to a well-functioning democracy, the design and maintenance of that public sphere should be "constitutional" in the sense that it is constitutive of democracy. But most of what you and I have called *constitutional design* is orthogonal to it.

Constitutional design—in the sense of organizing basic governmental structures—has surprisingly little to do with the production of such a well-functioning digital public sphere. The characteristic features of media policy in the digital age are not primarily constitutional. They involve technological design, infrastructure investment, legislation, and administrative regulation.[53]

The First Amendment does protect the public sphere because it protects the freedoms of speech and press. These constitutional guarantees are necessary to protect democracy, but, as noted above, they are not sufficient. Democracies need trusted and trustworthy institutions for the production and dissemination of knowledge, as well as formal constitutional freedoms.

Not only are formal guarantees of free speech and free press insufficient to cure what ails the digital public sphere, but businesses have sought to interpret these constitutional guarantees to hinder the necessary reforms. In these situations, you might argue that the Constitution—as interpreted by the courts—is part of the problem. This returns us to your distinction between the Constitution of Conversation—those parts of the Constitution that lawyers endlessly debate and that can change with new judicial appointments—and the Constitution of Settlement, which concerns the hard-wired provisions that lawyers rarely discuss but are the central focus of constitutional design. The judiciary may have made it difficult to reform the digital public sphere. Yet doctrinal debates over whether courts have wrongly interpreted the First Amendment to serve deregulation rather than democracy involve the Constitution of Conversation and not the Constitution of Settlement that your work is most concerned with.

Jack

53. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427, 443–44 (2009).